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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1274

WILLIAM C. KAHL, Petitioner,

v.

THOMAS BREEN, a minor, by his mother and next of friend, Jane Breen; and JAMES A. ANTON, a minor, by his parents and next of friend, William and Marie Anton, Respondents.

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ATTORNEYS FOR RESPONDENTS

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RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

QUESTION PRESENTED [1]

Does a public high school regulation governing the length of hair of male students violate the Constitution of the United States where the high school authorities have not met a substantial burden of justification for such a regulation.

RESPONDENTS' STATEMENT OF THE CASE

The plaintiffs believe that the relevant and material facts of this case are amply set forth in the decision of the District Court and the Court of Appeals for the Seventh Circuit and incorporate such findings of facts as their statement of facts. The trial court inter alia specifically found the following:

> The record contains no suggestions that the length of hair constituted a health problem or a physical obstruction or danger to any person [nor]was any disruption or disturbance caused by the length of his hair (Pet. App. A, at 7a and Pet. App. B, at 25a.

1/ Respondents consider the "Questions Presented by Petitioner" to be essentially one question, which respondents have set forth above.

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The trial court further found that the plaintiff's hair length was not "obscene," (Pet. App. B, at 25a), and analyzed in detail the relation between length of hair and disruption - or rather, the lack of evidence on the point in the trial court (Pet. App. B, at 43a - 44a).

THE WRIT SHOULD NOT BE GRANTED

I.

THERE EXISTS NO SERIOUS CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS AS TO THE VALIDITY OF REGULATIONS CONTROLLING LENGTH OF HAIR OF PUBLIC HIGH SCHOOL STUDENTS.

In 1968 the Court of Appeals for the Fifth Circuit decided Ferrell v. Dallas Independent School District, 392 F.2d 697. The Seventh Circuit properly distinguished Ferrell, supra, from the case at bar. (Pet. App. A, at 7a - 8a). In Ferrell, supra, disruption and disturbances existed where absolutely none existed under the facts in the case at bar.

Moreover, the Fifth Circuit Court of Appeals has pending before it a case dealing with a grooming code for male public high school students. In Stevenson v. Wheeler County Board of Education, ____F. Supp.____, Civ. Action No. 731 (S.D. Ga., Dublin Div., Nov. 17, 1969), the District Court denied relief to the plaintiffs, high school students. This case has been argued on an expidited appeal in the Fifth Circuit Court of Appeals. Stevenson v. Wheeler County Board of Education, No. 28875

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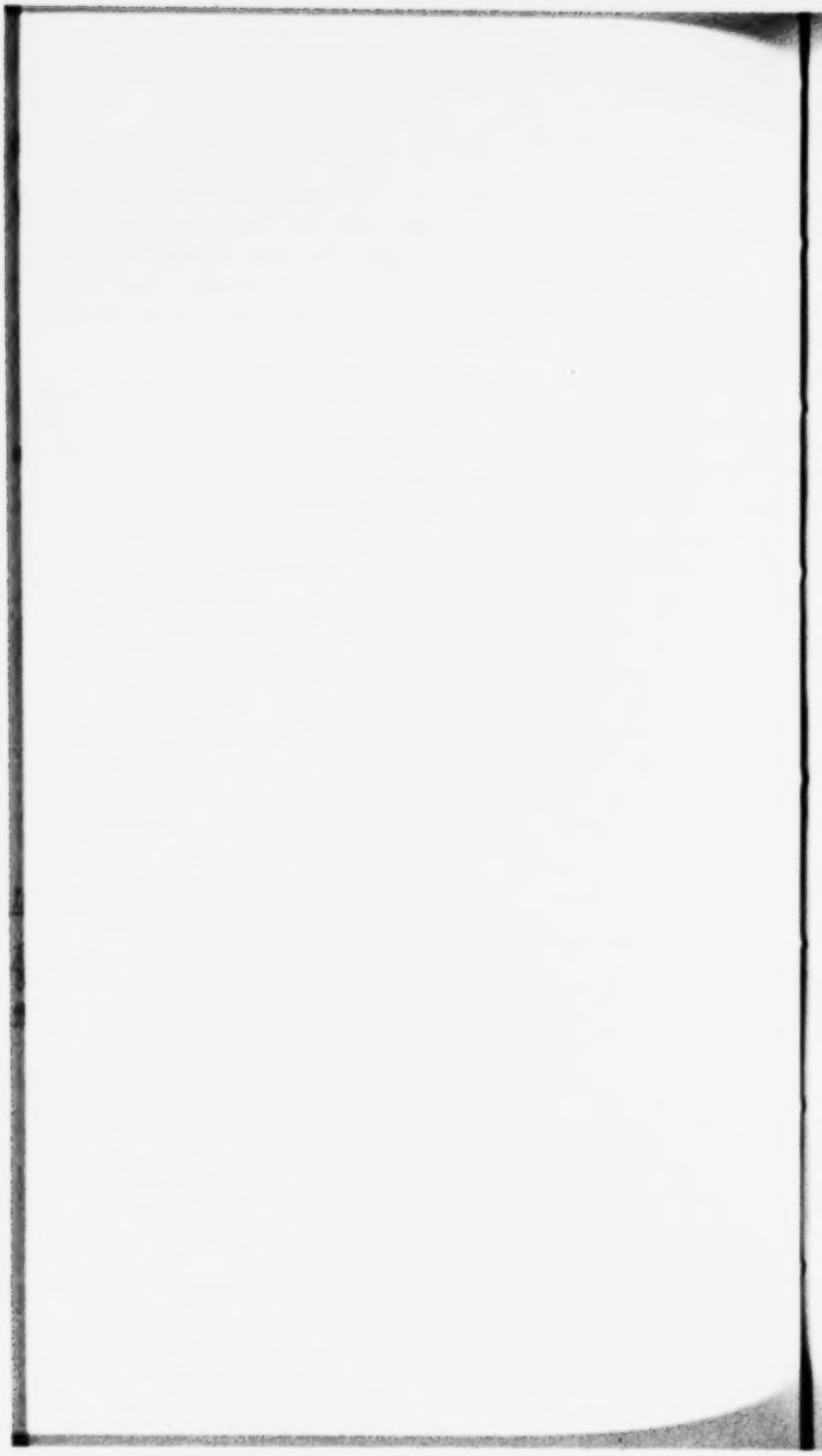
(CA5, Argued January 21, 1970). This case raises many of the same issues raised in the case at bar. In light of the pendency of Stevenson, there is as yet no conflict between the decisions of the Seventh and Fifth Circuit Courts of Appeals, and the question of a conflict between the Circuits is, at best, premature.

Subsequent to the publication of the Fifth Circuit Court of Appeals' decision in Ferrell, supra, federal district courts of that Circuit have had decisions published opposed to Ferrell. In Zachry v. Brown, 299 F.Supp. 1360 (N.D. Ala. 1967), Judge Lynn ruled that a dress code at a junior college imposed an unreasonable classification upon male students. And recently in Griffin v. Tatum, 300 F.Supp. 60 (M.D. Ala. 1969), Judge Johnson quoted extensively from Judge Doyle's decision in the case at bar, and held the regulation in question violative of the Fourteenth Amendment. Thus, it can not be asserted that with the fact situation of this case there exists a conflict among the Circuits. See also Miller v. Gillis, ___ F.Supp.___, (N.D. Ill. 1969); Richards v. Thurston, 304 F.Supp. 499 (D. Mass. 1969); Olff v. East Side Union High School District, 305 F.Supp. 557 (N.D. Calif. 1969); and Calbillo v. San Jacinto Junior College, 305 F.Supp. 857 (S.D. Tex. 1969).

II.

THE DECISIONS BELOW CLEARLY SET FORTH THE STANDARD TO BE APPLIED TO REGULATIONS GOVERNING GROOMING OF HIGH SCHOOL STUDENTS.



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It can not be seriously argued that the decisions below do not set forth the standard to be applied to regulations governing grooming of public high school students. Both the District Court and the Court of Appeals adopted the test that the school board must sustain a substantial burden of justification for its regulations, after having found that the rights involved herein were Constitutional rights, either within the "penumbra" of rights of the First Amendment or those "additional fundamental right[s]" encompossed in the Ninth Amendment. (Pet. App. A, at 5a). It is clear that in the case at bar the petitioner failed to meet this burden, or, for that matter, any burden of justifying its regulation other than conjecture and surmise, and the courts below so found.

III.
THIS CASE MAY NOW BE MOOT.

It should here be pointed out that counsel have reason to believe that both plaintiffs are no longer students at Williams Bay High School, Thomas Breen having recently left the State of Wisconsin and James Anton having graduated from said high school. This matter may now be moot.

CONCLUSION

For the above reasons a Writ of Certiorari should not be issued.

Respectfully submitted,

SANDER N. KARP
MELVIN F. GREENBERG
PERCY L. JULIAN, JR.

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AFFIDAVIT OF MAILING

STATE OF WISCONSIN)
) ss.
COUNTY OF MILWAUKEE)

SANDER N. KARP, being duly sworn on oath, deposes and says that on the 13th day of May, 1970, he mailed four (4) copies of the Response to the Petition

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for a Writ of Certiorari with postage prepaid to: Robert W. Warren, Attorney General, and Robert D. Martinson, Assistant Attorney General, Department of Justice, State Capitol, Madison, Wisconsin, 53702, and Max C. Ashwill, Legal Consultant, Department of Public Instruction, 126 Langdon Street, Madison, Wisconsin, 53702, counsel for Petitioner. He believes that all those parties required to be served have been served.

Sander N. Karp
704 West Wisconsin Avenue
Suite 309W
Milwaukee, Wisconsin 53233

Attorney for Respondents.

Subscribed and sworn to before me this_____day of May, 1970.

Notary Public, State of Wisconsin

My commission is _____.